



Kentucky Law Journal

Volume 79 | Issue 2

Article 5

1990

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Recommended Citation

Smith, Christopher E. (1990) "The Supreme Court in Transition: Assessing the Legitimacy of the- Leading Legal Institution," *Kentucky Law Journal*: Vol. 79 : Iss. 2 , Article 5.
Available at: <https://uknowledge.uky.edu/klj/vol79/iss2/5>

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The Supreme Court in Transition: Assessing the Legitimacy of the Leading Legal Institution

BY CHRISTOPHER E. SMITH*

INTRODUCTION

Justice William Brennan's retirement from the United States Supreme Court accelerates the high Court's transition toward dominance by justices who possess values and philosophies distinctly different from those of their immediate predecessors.¹ Although Republican presidential appointees primarily composed the Court since the 1970s,² the justices appointed by President Reagan in the 1980s are each more conservative than the Republican-appointed justices whom they replaced. Justices Sandra O'Connor, Antonin Scalia, and Anthony Kennedy would not have joined several of the important liberal decisions supported

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¹ Commentators perceived the performance of Justice Anthony Kennedy, who began service on the Supreme Court in 1988, as tipping the balance in favor of a new conservative majority composed predominantly of justices appointed or elevated by President Reagan. See, e.g., McDaniel, *The Court Spins Right*, Newsweek, June 26, 1989, at 16 (description of significant changes in Supreme Court decisions affecting affirmative action); Epstein, *Reagan Appointee Pushes Top Court to Right*, Akron Beacon Journal, June 11, 1989, at G1, col. 1 (description of shift in Supreme Court decisions affecting discrimination and civil rights).

² Since the retirement of Justice William O. Douglas in 1975, the only remaining justices appointed by Democratic presidents are Justice Byron White, who was appointed by John F. Kennedy, and Justice Thurgood Marshall, who was appointed by Lyndon Johnson. Justices William Brennan and Lewis Powell were affiliated with the Democratic Party, but they were appointed to the Supreme Court by Republican Presidents Dwight Eisenhower and Richard Nixon, respectively. With the retirements of Powell in 1987 and Brennan in 1990, the Court will include seven Republicans appointed by Republican presidents.

by their predecessors, Justices Potter Stewart,³ Warren Burger,⁴ and Lewis Powell,⁵ respectively. The addition of President Bush's

³ Although Justice O'Connor appears to follow Justice Stewart's legacy of moderate conservatism in many cases, Stewart joined the Court's liberals in several important cases in which O'Connor's support would have been doubtful. For example, Stewart concurred in the decision in *Roe v. Wade*, 410 U.S. 113 (1973), and explicitly declared that individuals possess the right to be free from government interference in deciding whether or not to terminate a pregnancy. *Id.* at 171 (Stewart, J., concurring). By contrast, O'Connor has been critical of the Court's analysis in *Roe*, see *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting), and she has declined to endorse explicitly the existence of an individual's right to obtain an abortion. See *Webster v. Reproductive Health Services*, ___ U.S. ___, 109 S. Ct. 3040, 3058-64 (1989) (O'Connor, J., concurring). While Stewart was the author of an important opinion permitting Congress to prohibit racial discrimination by private individuals under its thirteenth amendment power, see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), O'Connor sought reconsideration of Congressional power to regulate private discriminatory conduct in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989). See Taylor, *Court, 5-4, Votes to Restudy Rights in Minority Suits*, N.Y. Times, Apr. 26, 1988, at 1, col. 1. In *Patterson*, O'Connor was a member of the slim majority that, although preserving Congressional power in theory, "scrapp[ed] a legal weapon successfully used in more than 100 cases to fight alleged discrimination by private schools, private employers, and others." Epstein, *supra* note 1, at G1, col. 3. Additionally, although the cases are arguably distinguishable, it is interesting to note that Stewart joined the five-member majority to overturn a conviction in the Supreme Court's original flag burning case of *Street v. New York*, 394 U.S. 576 (1969), while O'Connor joined the dissenters supporting criminal convictions for flag burning in the later cases of *Texas v. Johnson*, ___ U.S. ___, 109 S. Ct. 2533 (1989) and *United States v. Eichman*, U.S. ___, 110 S. Ct. 2404 (1990).

⁴ For example, Chief Justice Burger wrote the opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), endorsing a Congressional affirmative action statute that required a percentage of federal contract funds to be directed to businesses owned by members of specified ethnic minority groups. By contrast, Justice Scalia is one of the Court's most outspoken critics of affirmative action, see Scalia, *The Disease as Cure*, 1979 WASH. U.L.Q. 147, and he dissented in the Court's later decision supporting an affirmative action program mandated by Congress in *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, ___ U.S. ___, 110 S. Ct. 2997 (1990). Chief Justice Burger authored the employment discrimination decision which declared that Congress sought to eradicate "the consequences of [discriminatory] employment practices, not simply the motivation," *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971) (emphasis in original), while Scalia was a member of the five-member majority that backed away from the well-established *Griggs* precedent. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115 (1989). Throughout his judicial career, Scalia has sought to require discrimination victims to undertake the difficult task of proving discriminatory intent rather than merely showing discriminatory consequences. See King, *Justice Antonin Scalia: The First Term on the Supreme Court—1986-1987*, 20 RUTGERS L.J. 1, 36-38 (1988). Although Chief Justice Burger was a member of the majority supporting a right to abortion in *Roe*, Justice Scalia has actively advocated that *Roe* be reversed immediately. See *Webster*, ___ U.S. ___, 109 S. Ct. at 3064 (Scalia, J., concurring).

⁵ Although Justice Powell was a member of the majority in *Roe* and subsequently issued a plea for the preservation of the abortion decision in deference to the doctrine of *stare decisis*, *City of Akron*, 462 U.S. at 421 n.1, Justice Kennedy joined the plurality opinion in *Webster*, 109 S. Ct. at 3056, which advocated reconsideration of *Roe*. Justice

appointee, David Souter, to replace Justice Brennan continues the "conservatization" process and potentially may lead to dramatic changes in the Court's decisions affecting abortion, affirmative action, criminal defendants' rights, religious freedom, and other issues.

When there are personnel changes in the other institutions of American government, such as the election of a new president or new members of Congress, the public expects new decisions and policies, especially when the newcomers are from a different political party than their predecessors.⁶ These new decisions will stem from the policy preferences and partisan interests of the political actors elected to office. Because these decision makers are accountable to the public through the electoral process, voters can judge the new decisions and policies (or lack thereof) and change the governing institution again at the next election if they are dissatisfied.

By contrast, the Supreme Court portrays itself as a legal, rather than a political, institution.⁷ As such, the Court's decisions presumably are made through the application of reasoned legal prin-

Powell crafted the compromise opinion endorsing affirmative action programs in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), while Justice Kennedy has actively opposed the continuation of affirmative action by joining the five-member majority that struck down the City of Richmond's minority contract program in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and by dissenting vigorously against the continuation of the Federal Communication Commission's affirmative action policies in *Metro Broadcasting Inc.*, 110 S. Ct. at 3044.

⁶ This admittedly simplistic characterization describes the ideal of the American governing system, in which citizens can make choices about preferred leaders and public policies in the voting booth by casting ballots for candidates from the political party offering the most persuasive program. As some political scientists have noted, "[political parties are the central intermediary in making mass democracy operational." R. KOLBE, *AMERICAN POLITICAL PARTIES* 3 (1985). In actuality, the party system operates in an imperfect manner because of various structures within the political system and because some political interests control a disproportionate share of resources. See H. REITER, *PARTIES AND ELECTIONS IN CORPORATE AMERICA* 64-69 (1987).

⁷ The Supreme Court is obviously a political institution in a number of respects: its composition is determined by the election of particular presidents who will appoint new justices, its decisions affect controversial public policies, such as abortion, affirmative action, and pornography, and its decisions elicit responses from other political institutions, such as the Flag Protection Act of 1989 and the Civil Rights Act of 1990, which were enacted by Congress to counteract Supreme Court decisions affecting flag burning and civil rights, respectively. See S. GOLDMAN & T. JAHNIGE, *THE FEDERAL COURTS AS A POLITICAL SYSTEM* 39-59, 206-233 (3d ed. 1985). However, life tenure and protected salaries for the justices insulate the Court from political influences. See U.S. CONST.-art. III, sec. 1. The Court's utilization of black robes, rigidly formal procedures, and other accoutrements of judicial office give it an aura of neutrality and detachment intended to preserve the Supreme Court's unique status as the institution governed by law rather than politics.

ciples instead of naked policy preferences and partisan interests. Theoretically, if legal principles guide decision making, then a change in personnel should not cause abrupt shifts in the development of constitutional law

The Supreme Court's status as a legal institution reinforces the image of law as neutral and objective.⁸ The Court seeks to preserve its role and image as the country's leading legal institution because, given its removal from direct electoral accountability, to behave otherwise would lead to overt clashes with popular notions about democratic government.⁹ Upon close examination it is obvious that, contrary to the imagery of stable, slowly evolving legal principles determining legal decisions, case holdings can be dramatically affected by changes in the Court's composition. Within specific cases, it is easy to see how the competing policy preferences of liberal and conservative justices are manifested in their opinions.¹⁰ Overall, however, justices approach their decisions differently from actors within the other branches of government.

Although the justices' values and policy preferences affect their decisions, the Supreme Court's decision making process is cloaked in legal procedures that permit considered judgments and careful explanations of underlying justifications. According to one study, "[t]he institution perceived [by the public] to make decisions most fairly is the United States Supreme Court, in part because it makes

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With symbols such as law degrees, robes, walnut-paneled courtrooms, elevated benches, a special language, and the like, we help sustain the myth of an impersonal judiciary divining decisions based on some objective truth contained in the Constitution (another symbol), and knowable only by a select few. It is all a very reassuring view of policy-making (or rather, rule divining), for after the tumult, greed, and indecisiveness of the legislative process—not to mention the excesses, embarrassments and dissonance of the executive policy process—we quickly weary of the frustrations and disappointments of plain old POLITICS and wish to repair to the serenity, the sureness, indeed the utter sublimity of JUSTICE, which the LAW and its purveyors promise.

H. STUMPF, *AMERICAN JUDICIAL POLITICS* 42 (1988).

⁹ As commentators have observed, "[b]ecause courts, especially the nonelected federal courts, are not democratic institutions, they must not lightly substitute their own values and judgments for those of elected legislatures and executives. The legitimacy of courts rests in their fidelity to the law and its enforcement." J. GROSSMAN & R. WELLS, *CONSTITUTIONAL LAW AND JUDICIAL POLICY MAKING* 11 (3d ed. 1988).

¹⁰ See Smith, *Bright-Line Rules and the Supreme Court: The Tension Between Clarity in Legal Doctrine and Justices' Policy Preferences*, 16 OHIO N.U.L. REV. 119 (1990) (examples of decisions manifesting justices' policy preferences).

decisions on the basis of full information.”¹¹ As described by one long-time observer of the Supreme Court, the Court’s image and legitimacy as a legal institution are to some extent deserved:

[P]ublic respect for the [C]ourt—based partly on ignorance and partly on myth—is fundamentally well-placed. The justices’ constitutional interpretations owe more to political ideologies than they pretend. But far more than the Congress, far more than any recent president, justices reach decisions by searching their consciences, carefully sifting facts and law, trying to do right as they see the right.¹²

The introduction of increasingly conservative Reagan-appointees onto the Supreme Court during the 1980s initiated the process of moving constitutional law in new directions. These changes have attracted significant attention from the national news media¹³ and have raised questions about potential future developments affecting the Supreme Court’s role and actions. What will happen to the Supreme Court’s legitimacy as the nation’s leading legal institution during the current transitional era? In particular, how will the Supreme Court be affected by Justice Brennan’s retirement? Because of his “intellectual force [and] magnetic personality,”¹⁴ Justice Brennan was characterized as a “center of gravity” on the Court.¹⁵ If Brennan’s departure rapidly accelerates the pace of doctrinal changes and alters the justices’ interactive decision making processes, will the Supreme Court’s public image be affected? These are lingering questions with significant implications for the future of constitutional law and the Supreme Court’s role in the American system. Although most published commentaries on the Court’s transitional era discuss developments in specific substantive areas of law,¹⁶ the era’s effects upon the Court’s institutional image and

¹¹ Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC’Y REV. 469, 484 (1989).

¹² Taylor, *Season of Snarling Justices*, Akron Beacon J., Apr. 5, 1990, at A11, col. 1.

¹³ See, Lacayo, *Is the Court Turning Right?*, Time, Oct. 24, 1988, at 78; McDaniel, *supra* note 1, at 16; McDaniel, *Judicial Flash Points*, Newsweek, July 30, 1990, at 18-19; Kamen, *A Shift in Balance: New President Will Shape Court’s Future*, Cleveland Plain Dealer, Oct. 2, 1988, at 1C, col. 1.

¹⁴ Greenhouse, *An Activist’s Legacy*, N.Y. Times, July 22, 1990, at 1, 22, col. 3.

¹⁵ *Id.*

¹⁶ See, e.g., Hoffmann, *The Supreme Court’s New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165 (changes in contemporary Court’s view of habeas corpus claims); Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE

role also deserve careful attention. In the sections that follow, this Article analyzes the consequences of the developments affecting the Supreme Court and discusses how contemporary changes could affect the legitimacy and effectiveness of the Court as a judicial institution.

Part I of this Article addresses the importance of legitimacy to the Supreme Court's power and authority.¹⁷ After establishing the function of interpersonal relationships in the Court's decision making process, Part II discusses how verbal jousting and a loss of respect among the justices might affect the Court's perceived legitimacy as a legal institution.¹⁸ Part III continues the discussion of legitimacy in terms of the emerging majority's refusal to follow precedent.¹⁹ Part IV concludes the examination of legitimacy by discussing the Court's markedly partisan composition.²⁰

I. THE SUPREME COURT AND LEGITIMACY

A prominent concept in assessing modern political institutions is "legitimacy." Political legitimacy has been described as "the quality of 'oughtness' that is perceived by the public to inhere in a political regime."²¹ The concept of legitimacy refers to the public's acceptance of and obedience to a governing institution's actions as appropriate and proper within the established political system, even when people personally disagree with specific decisions.²² The legitimacy of governing institutions is important for two reasons. First, governing institutions need legitimacy in order to perform their societal functions. A lack of public support and acceptance can prevent an institution from performing its assigned tasks effectively.²³ Because the Supreme Court has a limited ability to enforce its decisions, a loss of legitimacy could hinder the imple-

L.J. 1297 (1990) (analysis of emerging constitutional theory with special attention to criminal cases); Rohde & Spaeth, *Ideology, Strategy and Supreme Court Decisions: William Rehnquist as Chief Justice*, 72 JUDICATURE 247 (1989) (study finding Chief Justice Rehnquist's decisions on substantive issues consistent with decisions earlier in his career).

¹⁷ See *infra* notes 21-43 and accompanying text.

¹⁸ See *infra* notes 44-87 and accompanying text.

¹⁹ See *infra* notes 88-130 and accompanying text.

²⁰ See *infra* notes 131-45 and accompanying text.

²¹ Merelman, *Learning and Legitimacy*, 60 AM. POL. SCI. REV. 548, 548 (1966).

²² C. BLACK, *THE PEOPLE AND THE COURT* 35 (1960).

²³ Jaros & Roper, *The U.S. Supreme Court: Myth, Diffuse Support, Specific Support, and Legitimacy*, 8 AM. POL. Q. 85, 85 (1980).

mentation and acceptance of judicial decisions.²⁴ Second, "there may be a relation between the legitimacy of an entire regime and that of its constituent operating institutions."²⁵ Any loss of stature as a judicial institution by the Supreme Court may have corresponding detrimental effects for the governing system as a whole.²⁶

The concept of legitimacy, as described here in relation to the Supreme Court, often is criticized as unproven and of doubtful validity.²⁷ Indeed, there is evidence that the public is unaware of the details of the Supreme Court's role and specific actions.²⁸ At a general level, however, research on public perceptions provides "some evidence that the legitimacy of the [Supreme] Court, at least as reflected in diffuse levels of support, affects compliance with unpopular decisions."²⁹ Perhaps the Supreme Court would be more effective if the public viewed the Court as motivated by partisan interests, like any other political institution, rather than as guided by the principles of law. This proposition will never be thoroughly tested, however, because the public, politicians, and the justices themselves continue to regard the Court as a legal institution that is distinctively different from other governing institutions within the political system. Whether or not the concept of the Supreme Court's legitimacy has empirical validity, it is "real" and important

²⁴ The Supreme Court depends on other political actors to accept and enforce its decisions. See C. JOHNSON & B. CANON, *JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT* 77-103 (1984). In the 1950's, for example, many Southern school districts actively resisted the Court's desegregation order in *Brown v. Board of Education*, 347 U.S. 483 (1954). The Court had to rely upon lower federal courts to apply its decision in individual cities and upon Executive Branch officials to enforce the judicial decisions, as when President Eisenhower used military troops to implement desegregation at Little Rock Central High School. See R. KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 752-754 (1975). Resistance by the public and other political actors, including the Executive Branch, may increase if the Supreme Court's stature as a legitimate judicial institution is tarnished. In the 1830s, the State of Georgia ignored a Supreme Court order to protect land belonging to the Cherokee people. President Andrew Jackson declined to enforce the decision. The consequences of this episode, as described by one historian, illustrate the tragic results when the Supreme Court's relative weakness is revealed: "All the states supported Georgia's flouting of the Supreme Court, as well as Jackson's policy, to force the tribes, against their will, to give up fertile lands that they had inhabited for centuries to move to the barren reaches of the Great Plains." M. UROFSKY, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 271-73 (1988).

²⁵ Jaros & Roper, *supra* note 23, at 85.

²⁶ See C. BLACK, *supra* note 22, at 52-53.

²⁷ See Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WISC. L. REV. 379.

²⁸ *Id.* at 408-12.

²⁹ Gibson, *supra* note 11, at 489.

because so many political actors believe in and seek to preserve the Court's image as a legal institution.

Why was there such a controversy about whether or not senators should ask President Bush's Supreme Court nominee, David Souter, directly about his views on abortion and other controversial subjects? As one news article described the issue: "There is nothing in law to prevent a senator from simply asking a Supreme Court nominee what [he or she] thinks. But modern tradition calls for a measure of tact that is at least partly rooted in the fear that direct questioning on hot-button issues could impinge on the *concept* of an independent judiciary" (emphasis added).³⁰ In reality, after confirmation, a federal judge is free to put forth nearly any views in legal opinions.³¹ Thus, by posing such questions, the senators do not seriously affect judicial independence. The dispute about questioning judicial nominees actually demonstrates a widespread, deep-seated desire to maintain a *belief* in the neutrality of judicial officers and to preserve the "concept" of the Supreme Court's status as a legal institution. If nominees responded to senators' specific queries with complete answers, then it might be more difficult to maintain the justices' image as decision makers who follow legal principles instead of personal viewpoints.

As described by scholars, the "Model of Law" applied to the Supreme Court seeks to avoid the political contamination, or harm to the Court's legitimacy, that would follow if the Supreme Court were viewed as a political institution:

[The Model of Law] emphasizes the differences between law and politics and the relative autonomy of law . . . The difference can be appreciated best as a distinction in the justification of legal and political decisions. The primary and proper justification of legal decisions, so the argument goes, is one of procedure and

³⁰ Morganthau, Cohn, DeFrank, McDaniell, Wright & King, *Popping the Question: Both Sides in the Abortion War Want Answers*, Newsweek, Aug. 6, 1990, at 17, 18 [hereinafter Morganthau].

³¹ Federal judicial officers are free to behave independently and express their views in their opinions. For example, an Alabama district judge attempted to undo Supreme Court precedents that prohibited organized prayer in public schools. His conservative supporters "treated [his] 'startling' conclusions as belated advances in legal reasoning rather than as judgments flying brazenly in the face of thirty-five years of constitutional law." L. CAPLAN, *THE TENTH JUSTICE* 98-99 (1987). The Supreme Court brought the judge back into line by reversing his decision in *Wallace v. Jaffree*, 472 U.S. 38 (1985). The judge's rebellion had no effect upon his continued position and authority as a district judge. Thus, independent lower court judges may find their free-thinking opinions reversed on appeal. Such an intra-judicial constraint on lower court judges does not detract from the independence of the judiciary as a whole.

method, of means and not ends. The strength, and ultimately the legitimacy, of law and the courts lies in the establishment and application of fair predictable procedures, not in producing any particular result. Law is the application of principles to the solution of human problems, and it is only when judges objectively apply "neutral" principles that they are acting as *judges* whose decisions are entitled to legitimacy and respect.³²

Although social scientists who study judicial decision making can identify patterns of values, personal experiences, and interests associated with particular court decisions,³³ lawyers and legal scholars preserve the image of law and judicial institutions by analyzing legal principles rather than the actual decision making processes undertaken by judges.³⁴ Judge Robert Bork's attacks on his critics focus on their "political" approach to law.³⁵ Bork's critics duck the "politics" accusation by claiming that the substantive content of his legal theories led to the defeat of his nomination to the Supreme Court.³⁶ By avoiding the association of "politics" with "law," the image and legitimacy of judicial institutions is protected against a major underlying risk: "If courts do not preserve their distinctiveness from other political bodies, if they cease being 'courts,' then their claim to legitimacy—and their power—will erode."³⁷

Both liberal and conservative justices have expressed concern about the Supreme Court's image and legitimacy.³⁸ Justice Felix

³² J. GROSSMAN & R. WELLS, *supra* note 9, at 11.

³³ See, e.g., Tate, *Personal Attribute Models of Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economic Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355 (1981) (factors such as justices' party identification and prior prosecutorial experience associated with particular kinds of judicial decisions). A comprehensive review of studies of judicial decision making found that "judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do." Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POL. BEHAV. 7, 9 (1983).

³⁴ See, e.g., Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739 (1986) (comparison of equal protection and free expression principles with legal principles applied in freedom of religion cases); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (application of "neutral" legal principles in constitutional interpretation).

³⁵ See Bork, *The Case Against Political Judging*, NAT'L REV., Dec. 1989, at 23; Bork, *The Inherent Illegitimacy of Noninterpretivism*, in *POLITICS AND THE CONSTITUTION* 111 (1990).

³⁶ Pertschuk & Schaetzel, *The Remaking of Robert Bork*, 249 THE NATION 750, 751 (1989).

³⁷ J. GROSSMAN & R. WELLS, *supra* note 9, at 11.

³⁸ Not all of the justices share the same level of concern about maintaining the Supreme Court's image as a legal rather than a political institution. Although Justice

Frankfurter wrote that "[t]he [Supreme] Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."³⁹ More recently, Justice Blackmun reiterated the concern that the Supreme Court should avoid any action that might "undermine[] public confidence in the disinterestedness of the Judicial Branch."⁴⁰ Blackmun explicitly expressed his belief in the importance of the Supreme Court's image and legitimacy by saying that "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."⁴¹ Consistent with these sentiments is Justice Scalia's fear that the Supreme Court will be regarded as a political rather than a legal institution, giving rise to a loss of legitimacy.⁴²

Although critics may be correct in asserting that there is little proof that the concept of "legitimacy" enhances the Supreme Court's functions,⁴³ the Court's image is obviously important to justices, scholars, politicians, journalists, and the public. Because this concern, whether justified or not, manifests itself in Supreme Court opinions, politicians' assessments of judicial nominees, and news media descriptions of judicial institutions, it is important to assess how the Court's legitimacy and image may be affected by the changes occurring in the current transitional era.

II. THE JUSTICES' INTERACTIONS WITHIN THE COURT

A. *Judicial Decision Making and Interpersonal Relations*

The personalities and interactions of the justices have, in the

O'Connor was embarrassed when a letter she wrote was used by conservative Arizona Republicans to support their claim that the United States is a "Christian nation," *A Private Opinion*, Time, Mar. 27, 1989, at 45, Justice Marshall apparently feels no inhibitions about bluntly criticizing Presidents Reagan and Bush and subsequently serving as a target for condemnation by offended politicians and commentators. See *Marshall: Speaking Ill of the Dead*, Newsweek, Aug. 6, 1990, at 18.

³⁹ *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

⁴⁰ *Mistretta v. United States*, 488 U.S. 361, 405-409, 109 S. Ct. 647, 672-73 (1989).

⁴¹ *Id.*

⁴² In complaining that his colleagues did not forthrightly address the issue of abortion, Scalia asserted that *Roe v. Wade*, 410 U.S. 113 (1973), should be reversed in order to avoid tarnishing the Court's image: "Alone sufficient to justify a broad holding is the fact that our retaining control, through *Roe*, of what I believe to be, and many of our citizens recognize to be, a political issue, continuously distorts the public perception of the role of this Court." *Webster v. Reproductive Health Services*, ____ U.S. ____, 109 S. Ct. 3040, 3065 (1989) (Scalia, J., concurring).

⁴³ See Hyde, *supra* note 27, at 389-400.

words of one scholar, "considerable effect on some decisions."⁴⁴ By utilizing the private papers of former justices, social scientists have shown that the justices influence each other through persuasion, bargaining, and other tactics involving interpersonal relationships.⁴⁵ Relationships and interactions within the Court are part of what has been characterized as "a critical group element [in] the [Supreme] Court's decision making"⁴⁶

Part of the decisional process occurs in the group settings of oral argument and the Court's conferences. Further, justices have incentives to interact and work together on decisions outside of conference. The shared goal of seeking majority approval for an opinion in each case often requires interaction. The desire to obtain as much consensus as possible gives justices further reason to work together to reach agreement on outcomes and opinions.

Group interaction also accounts for the shifting of individual votes and collective decisions after tentative decisions in conference. A justice may change a position independently after further study of a case, but frequently it is input from colleagues that spurs reconsideration of an initial position.⁴⁷

The Court's decision-making processes will be altered with the departure of Justice Brennan. Within the interactive process of Supreme Court decision making, Justice Brennan has been called "the best coalition builder ever to sit on the Supreme Court."⁴⁸ Because Brennan could be "irresistibly persuasive,"⁴⁹ "[t]erm after term, he demonstrated his ability to score the unexpected victory or at least to shape outcomes that he no longer had the votes to control."⁵⁰ With Brennan's departure, the dynamics of the Court's internal processes and interpersonal relationships will change, and those changes will affect the Court's decisions. Although the ulti-

⁴⁴ L. BAUM, *THE SUPREME COURT* 149 (3d ed. 1989).

⁴⁵ See W. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 37-90 (1964).

⁴⁶ L. BAUM, *supra* note 44, at 149.

⁴⁷ *Id.*

⁴⁸ *Id.* at 152 (quoting Serrill, *The Power of William Brennan*, *Time*, July 22, 1985, at 62).

⁴⁹ Denniston, *Artful Persuasion Brought Victories*, *Akron Beacon J.*, July 22, 1990, at A1, A8, col. 4.

⁵⁰ Greenhouse, *supra* note 14, at 1, 22, col. 3.

mate consequences of the changes affecting the Supreme Court are uncertain, it is clear that the nation's highest court is in a transitional era in which the recent influx of new justices will alter the previously established patterns of case decisions and judicially influenced public policies.

1. *Interpersonal Relations in Supreme Court History*

In previous eras, the dynamics of the Supreme Court's decision-making processes have been affected by conflicts between individual justices. During the 1920's and 1930's, Justice James McReynolds demonstrated his extreme anti-Semitism by leaving the room whenever Justice Louis Brandeis, the first Jewish justice, spoke during conference.⁵¹ McReynolds alienated his colleagues and undercut his potential influence within the Court by responding to his colleagues' draft opinions with such comments as "[t]his statement makes me sick."⁵² McReynolds' behavior graphically illustrates one scholar's observation that "Supreme Court justices, like other people, vary in their likeability and their skills in personal relations, and these characteristics inevitably will affect their influence."⁵³

Although there are other examples of justices' personality traits and interpersonal conflicts affecting interactions within the Supreme Court, most notably the feud between Justices Hugo Black and Robert Jackson in the 1940's and 1950's,⁵⁴ and the alienation of the professorial Justice Frankfurter from his colleagues during the same era,⁵⁵ the contemporary Supreme Court has entered a

⁵¹ D. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 281 (2d ed. 1990).

⁵² L. BAUM, *supra* note 44, at 151.

⁵³ *Id.*

⁵⁴ Justices Jackson and Black, along with other justices, argued about Black's failure to disqualify himself from consideration of a case being argued by Black's former law partner. Disputes continued over other matters, and the Black-Jackson feud may have prevented Jackson from being named Chief Justice to succeed Harlan Stone in 1946. W. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 65-68 (1987). As described by one scholar, "Hugo Black and Robert Jackson engaged in an open feud, and the papers of the Court's justices depict bitterness and distrust between other pairs of justices." L. BAUM, *supra* note 44, at 156.

⁵⁵ In his memoirs, Justice William O. Douglas was very critical of his colleague, Felix Frankfurter:

He was primarily a teacher, and the habits he had acquired in that role carried over into all subsequent ones. Whenever a new Justice appeared at the Supreme Court, Frankfurter seemed to spend extra time and energy converting him to

new phase in making its conflicts visible to the public. One long-time observer of the Supreme Court characterized the contemporary era as the "season of snarling justices"⁵⁶ because the justices seem to be establishing a new norm for attacking each other *publicly* in their published opinions.

2. *Manifestations of Conflict in Contemporary Opinions*

In most Supreme Court opinions, justices criticize the reasoning and results advocated by colleagues with whom they disagree. Prior to the acceleration of new appointments to the Supreme Court in the late 1980's, there were instances of dissenting opinions aiming barbed comments at the views of other justices.⁵⁷ With the addition of Justices Scalia and Kennedy, and the concomitant shift in decisions affecting a variety of substantive areas in constitutional

a particular school of thought that Frankfurter preferred. He was indeed a proselytizer extraordinary.

He was, as I have said, a proselytizer, and every waking hour vigorously promoted the ideas he espoused. Up and down the halls he went, pleading, needling, nudging, probing. He never stopped trying to change the votes on a case until the decision came down.

Frankfurter also engaged in histrionics in Conference. He often came in with piles of books, and on his turn to talk, would pound the table, read from the books, throw them around and create a great disturbance. At times, when another [justice] was talking, he would break in, make a derisive comment and shout down the speaker.

[Justice Frank] Murphy was a special target of Frankfurter, who made fun of him behind his back. Murphy had a disease that caused poor blood circulation in his extremities. So he spent the hours in Conference rubbing his hands, massaging his fingers, and the like. Frankfurter pilloried Murphy for the habit, whispering that Murphy was so distraught that he was trying to solve legal problems by wringing his hands.

W DOUGLAS, *THE COURT YEARS: 1939-1975*, 21-25 (1980).

⁵⁶ Taylor, *supra* note 12, at A11, col. 1.

⁵⁷ In *Marsh v. Chambers*, 463 U.S. 783 (1983), Justice Brennan chastized Chief Justice Burger for completely ignoring the test for establishment clause violations that he had created in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in order to uphold prayer in the Nebraska state legislature. Brennan wrote, "I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." *Id.* at 800 (Brennan, J., dissenting). In *United States Steel Workers v. Weber*, 443 U.S. 193 (1979), Justice Rehnquist believed that the majority deviated from the purposes of anti-discrimination statutes by approving an affirmative action program. He wrote, "[t]hus, by a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language." *Id.* at 222 (Rehnquist, J., dissenting).

law, there has been a discernible increase in the frequency and stridency of opinions attacking other justices. The harsh tone of many contemporary opinions is attributable to the personality traits of the justices, the evolving norm of combative attacks upon opponents, and the deep disagreements between justices concerning recurring controversial issues.⁵⁸

In *Webster v. Reproductive Health Services*,⁵⁹ Justice Scalia condemned both his allies and opponents for not forthrightly removing the Supreme Court from involvement in the abortion issue. He noted sarcastically that the reasoning in Chief Justice Rehnquist's opinion, which permits greater state regulation of abortions—the result supported by Scalia—“will doubtless be heralded as a triumph of judicial statesmanship”⁶⁰ despite the fact that the Supreme Court's involvement in the abortion issue “continuously distorts the public perception of the role of this Court.”⁶¹ Although the other justices who are inclined to join Scalia in overturning *Roe v. Wade* indicated that they would wait patiently until Justice O'Connor is willing to provide the needed fifth vote for reversal,⁶² Justice Scalia said that O'Connor's arguments “cannot be taken seriously”⁶³ and pointedly highlighted inconsistencies in O'Connor's previous decisions.⁶⁴

In other opinions, Scalia utilized strident, cataclysmic warnings to condemn his colleagues for not adhering to his vision of separation of powers and judicial restraint. When his colleagues endorsed the use of independent counsels for the investigation of misconduct in the Executive Branch, Scalia's solitary dissent ex-

⁵⁸ In addition to disagreements about controversial substantive issues, new battles are developing among the justices over the proper method for interpreting statutes. Justice Scalia places relatively little weight upon legislative history. The justices' continued use of legislative history in some cases has exacerbated conflicts. According to one scholar, “there are still cases every Term in which the Court uses legislative history to massage a better result out of a statute whose plain meaning seems unreasonable. These cases have sometimes provoked sharp exchanges on the Court, however.” Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 659 (1990).

⁵⁹ ____ U.S. ____, 109 S. Ct. 3040 (1989).

⁶⁰ *Webster v. Reproductive Health Services*, ____ U.S. ____, 109 S. Ct. 3040, 3064 (Scalia, J., concurring).

⁶¹ *Id.* at 3065.

⁶² Although he wrote an opinion criticizing the entire basis for the majority opinion in *Roe v. Wade*, Chief Justice Rehnquist stopped short of advocating reversal and claimed to agree with Justice O'Connor's conclusion that the *Webster* case did not call *Roe* into question. *Webster*, 109 S. Ct. at 3045.

⁶³ *Id.* at 3064 (Scalia, J., concurring).

⁶⁴ *Id.*

coriated the majority's reasoning for its "utter incompatibility with our constitutional traditions"⁶⁵ and predicted that the Court's decision would do "great harm" to the country.⁶⁶ In another solo dissent, he predicted that the Court's approval of the inter-branch Sentencing Commission "will be disastrous" for the country.⁶⁷ Scalia's harshest criticism of his colleagues came in the "right to die" case, where he warned that, by continuing the judiciary's involvement in controversial moral issues, the other eight justices might lead the Court to "destroy itself."⁶⁸

In a split decision concerning the permissibility of religious holiday displays in public buildings, Justices Blackmun and Kennedy blatantly mimicked each other's criticisms. Although admitting his characterization to be "uncharitable,"⁶⁹ Justice Kennedy described Justice Blackmun's test as "using little more than intuition and a tape measure."⁷⁰ Blackmun shot back that "[i]f one wished to be 'uncharitable' to Justice Kennedy, one could say that his methodology requires counting the number of days during which the government displays Christian symbols and subtracting from this the number of days during which non-Christian symbols are displayed. . ."⁷¹ Kennedy concluded that Blackmun and the majority had undertaken "an Orwellian rewriting of history as many understand it," and that "I can conceive of no judicial function more antithetical to the First Amendment."⁷² Blackmun countered that Kennedy's reading of precedents "would gut the core of the Establishment Clause."⁷³ Moreover, Blackmun asserted that Kennedy "misperceived" the Constitution's mandate of respect for religious pluralism and that "[n]o misperception could be

⁶⁵ *Morrison v. Olson*, 487 U.S. 659, 709 (1988) (Scalia, J., dissenting).

⁶⁶ *Id.* at 733.

⁶⁷ *Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647, 683 (1989) (Scalia, J., dissenting). Scalia issued a similar warning in a split decision in which the majority found that political patronage violated the constitutional rights of individuals who lost jobs because they were not affiliated with the political party in power. According to Scalia, the decision "may well have disastrous consequences for our political system." *Rutan v. Republican Party of Ill.*, U.S. , 110 S. Ct. 2729, 2747 (1990) (Scalia, J., dissenting).

⁶⁸ *Cruzan v. Missouri*, ____ U.S. ____, 110 S. Ct. 2841, 2863 (1990) (Scalia, J., concurring).

⁶⁹ *County of Allegheny v. ACLU*, ____ U.S. ____, 109 S. Ct. 3086, 3144 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

⁷⁰ *Id.* at 3144-45.

⁷¹ *Id.* at 3108.

⁷² *Id.* at 3146 (Kennedy, J., concurring in the judgment in part and dissenting in part).

⁷³ *Id.* at 3106.

more antithetical to the values embodied in the Establishment Clause."⁷⁴ Blackmun also reacted to Kennedy's criticisms of the majority's supposed hostility to religion as if they were personal affronts: "[N]othing could be further from the truth, and the accusations could be said to be as offensive as they are absurd."⁷⁵

Justice Blackmun had never been noted for combative or stinging opinions. However, in 1989 the deep schism within the Court over issues of discrimination was illuminated by Blackmun's poignant criticism of his colleagues in the emerging conservative majority for their insensitivity to racial discrimination: "Sadly, this [construction of an employment discrimination statute] comes as no surprise. One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."⁷⁶

This sharp attack on the new majority may have struck a nerve. The following year Justice Scalia counterattacked with the accusation that the Court's liberals are overly sensitive to issues of racial discrimination. In a case alleging racial discrimination in the selection of a jury, Justice Scalia wrote for the majority: "Justice Marshall's dissent rolls out the ultimate weapon, the accusation of insensitivity to racial discrimination—which will lose its intimidating effect if it continues to be fired so randomly."⁷⁷ Scalia's sarcastic statement implies that the liberal justices have been improperly cowed by unjustified concerns for racial discrimination. This was a damning broadside equal to Blackmun's condemnation of the conservatives' insensitivity.⁷⁸

⁷⁴ *Id.* at 3110.

⁷⁵ *Id.*

⁷⁶ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115, 2136 (1989) (Blackmun, J., dissenting).

⁷⁷ *Holland v. Illinois*, ____ U.S. ____, 110 S. Ct. 803, 810 (1990).

⁷⁸ In his dissenting opinion, Justice Marshall responded to Justice Scalia's attack by accusing the majority of having "selective amnesia" about relevant case precedents. *Id.* at 818 (Marshall, J., dissenting). Marshall also addressed Scalia's specific accusation by asserting that it demonstrated that the majority has little understanding of racial discrimination cases concerning juries:

The majority considers "random[]" my suggestion that its opinion today signals a retreat from our previous efforts to eradicate racial discrimination. Our cases have repeatedly used the Sixth Amendment's fair cross-section requirement as a weapon to combat racial discrimination. Yet today, the majority says that the Sixth Amendment is no more concerned with discrimination against Afro-Americans than it is with discrimination against "postmen." The majority concludes that "[r]ace as such has nothing to

3. *The Risks of Verbal Jousting*

By attacking each other openly and personally in their published opinions, the justices potentially threaten the Supreme Court's image and legitimacy as a legal institution. Attention-grabbing disagreements among the justices can cast doubt on the general belief that the Supreme Court is following established legal principles. Thus, the justices normally take care to use their written opinions to develop elaborate explanations and rationalizations for their interpretations of the Constitution and challenged statutes. As described by one scholar,

The function of an opinion is to persuade people outside the Court—first, the parties to the case, and then others, the legal community and other “court-watchers”—that the decision is a reasonable one, reasonably arrived at, with sufficient guidance in the court's opinion to allow those affected to control “primary conduct.”⁷⁹

Opinions containing open, personal attacks on fellow justices can harm the Court's image by magnifying perceptions that personal or ideological disputes, rather than legal principles, determine the justices' interpretations of constitutional law. As one observer warns,

[T]here is still a serious cost to public brawling on the bench: The more the justices question each other's basic common sense and good faith, the more they may deplete the reservoir of popular good will that is so essential to their singular role in American life. They might eventually find their rulings dismissed as the work of unelected, unprincipled politicians.⁸⁰

B. Additional Manifestations of Interpersonal Conflict

Conflicts between justices are detectable beyond the public attacks that appear in the Court's published opinions. For example, Justice White has expressed his dismay that his colleagues are

do with the legal issue in this case.” I read these statements as a retreat; that the majority has so little understanding of our Sixth Amendment jurisprudence that it considers that criticism “random[]” is, if anything, proof that it is right on the mark [to label this a retreat].

Id. at 819-20 n.2.

⁷⁹ S. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 263 (1988).

⁸⁰ Taylor, *supra* note 12, at A11.

willing to hear fewer and fewer cases each year.⁸¹ White has dissented nearly seventy times from decisions not to review cases.⁸² Such disagreements about the Supreme Court's proper role in accepting cases for consideration could exacerbate conflicts among the justices.

Oral argument provides another forum in which conflicts between justices can be manifested and exacerbated. News reports characterized Justices O'Connor and Scalia as "sparring" during oral arguments in the 1989 term abortion cases.⁸³ Some have raised concerns that Justice Scalia's aggressive behavior during oral arguments causes friction with other justices. Justice Blackmun revealed in a speech that,

[Justice Scalia] is and always will be the professor at work. He asks far too many questions, and he takes over the whole argument of the counsel, he will argue with counsel. Even [Justice O'Connor], who asks a lot of questions, a couple of times gets exasperated when [Scalia] interrupts her line of inquiry and goes off on his own. She throws her pencil and [says,] "umh, umh."⁸⁴

On at least one occasion, Chief Justice Rehnquist had to interrupt oral argument to prevent Scalia from absorbing the entire allotted time period: during Scalia's lengthy questioning of an attorney, Rehnquist finally interrupted to tell the attorney, "[y]ou have fifteen minutes remaining. I hope when you're given the opportunity to do so, you'll address some of your remarks to the question on which the Court voted to grant certiorari."⁸⁵

Although conflicts during oral arguments and disputes over granting certiorari are less visible to the public,⁸⁶ such conflicts

⁸¹ During the 1989 term, the justices heard fifteen percent fewer cases than the preceding term. Kaplan & McDaniel, *No Heavy Lifting at the High Court*, Newsweek, Feb. 5, 1990, at 63. This pattern of being increasingly restrictive regarding the number of cases accepted for hearing comports with Justice Scalia's view that the federal courts should limit significantly the number and kinds of cases accepted for adjudication. See Hengstler, *Scalia Seeks Court Changes*, 73 A.B.A. J., April 1, 1987, at 20.

⁸² Biskupic, *Justices Show A Propensity for Letting Others Decide*, 48 CONG. Q. 2130, 2131 (1990).

⁸³ *Abortion: Sparring on the Bench*, Newsweek, Dec. 11, 1989, at 49.

⁸⁴ Taylor, *On a Justice's Scale, Colleagues Are Sometimes Weighty*, N. Y. Times, July 25, 1988, at B6, col. 2, 3. One scholar who spent a year working at the Supreme Court indicates that the justices often are irritated by Scalia's outspokenness. D. O'BRIEN, *supra* note 51, at 274.

⁸⁵ D. O'BRIEN, *supra* note 51, at 274.

⁸⁶ The relative invisibility of all aspects of Supreme Court justices' behavior, except

may attract the attention of the news media or encourage further interpersonal attacks in published opinions, thereby harming the Court's image and legitimacy⁸⁷

III. *Stare Decisis* and Legitimacy

The principle of *stare decisis*, or adherence to case precedent, has been described as "firmly rooted in [American] jurisprudence."⁸⁸ The use of previous judicial decisions as precedents provides stability and predictability⁸⁹ Justice Kennedy described the supreme importance of *stare decisis*:

The [Supreme] Court has said often and with great emphasis that "the doctrine of *stare decisis* is of fundamental importance to the rule of law" (citation omitted) [I]t is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon "an arbitrary discretion."⁹⁰

for published opinions, is illustrated by Chief Justice Rehnquist's description of Justice Jackson's battle with Justice Black in the 1940s. When Jackson and other justices objected to Black's participation in a decision involving a case presented by Black's former law partner, the "rift among the justices received no public attention at the time because the action on the petition for rehearing was buried in a long list of orders and a number of opinions were announced the same day." W REHNQUIST, *supra* note 54, at 66.

⁸⁷ It is possible, of course, that the justices are unaffected by the personal attacks in published opinions and the frictions that arise in their daily interactions. For example, according to one anecdote recounted by a former law clerk, Justice O'Connor is unaffected by Justice Scalia's verbal aggressiveness:

Even so, it may not be easy to rattle Justice O'Connor. A former clerk for another justice expressed doubt the other day that Justice O'Connor was particularly perturbed by Justice Scalia's verbal slings.

Shortly after Justice Scalia joined the Court in 1986, the ex-clerk recalled, the Justices met to discuss a pending case called *Johnson v. Santa Clara County*, [480 U.S. 616 (1987),] which concerned the legality of an affirmative action program intended to benefit women. Justice Scalia treated his new colleagues to a 15-minute lecture on the evils of affirmative action, particularly affirmative action for women. When he finished, Justice O'Connor smiled and, addressing him by his nickname, said, "Why, Nino, how do you think I got my job?" Her eventual opinion supported the program; Justice Scalia attacked it in a long dissent.

Greenhouse, *At the Bar: Name-calling in the Supreme Court: When the Justices Vent Their Spleen, Is There a Social Cost?*, N.Y. Times, July 28, 1989, at B10, col. 1.

⁸⁸ H. GRILLIOT & F. SCHUBERT, *INTRODUCTION TO LAW & THE LEGAL SYSTEM* 164 (4th ed. 1989).

⁸⁹ J. CALVI & S. COLEMAN, *AMERICAN LAW AND LEGAL SYSTEMS* 30-31 (1989).

⁹⁰ *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 2370 (1989).

A. *The Emerging Majority and Respect for Precedent*

As the Supreme Court becomes increasingly comprised of appointees who are labeled as "conservative,"⁹¹ one might expect the Court to show increased deference to *stare decisis*. As noted by one scholar, "[a] hallmark of conservatism, whether political or judicial is respect for and deference to tradition. In law, this deference becomes *stare decisis*: we follow what has come before, and the burden rests on those who would change it to persuade us as to why."⁹² It is apparent, however, that the Supreme Court's conservative justices seek "politically conservative *results* [through] liberal judicial *methods*."⁹³ The emerging conservative majority shows little reluctance to reverse case precedents, even when there are judicial decisions over many years solidifying the original precedent.

In *City of Akron v Akron Center for Reproductive Health*,⁹⁴ Justice Powell issued a plea for adherence to case precedent in abortion cases. Powell argued that there were "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v Wade*" because at least nine subsequent Supreme Court cases during an eight-year period affirmed the precedent.⁹⁵ If the Supreme Court were to overturn *Roe*, the dramatic shift would be damaging to the substantial public reliance on the well-established public policy of making abortion choices available during the first six months of pregnancy. As Powell subsequently declared in a veiled criticism of the emerging conservative majority, efforts to overturn well-established precedents "represent explicit endorsement of the idea that the Constitution is nothing more than what five justices say it is. This would undermine the rule of law."⁹⁶ By

⁹¹ President Nixon, who made four appointments to the Supreme Court, consistently asserted that he wanted to select nominees who would be "properly conservative" and would avoid imposing their views upon society. H. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 294-95 (2d ed. 1985). President Reagan used his three Supreme Court appointments, as well as his other judicial appointments, as a means of advancing his conservative political philosophy. D. O'BRIEN, *supra* note 51, at 100-114. President Bush nominated Judge David Souter to replace Justice Brennan, in part, because Souter was perceived to be a political and judicial conservative. Apple, *Bush's Move: Caution Wins*, N.Y. Times, July 24, 1990, at A1, A18, col. 2.

⁹² Glennon, *Will the Real Conservatives Please Stand Up?*, 76 A.B.A. J. Aug. 1, 1990, at 49, 50.

⁹³ *Id.*

⁹⁴ 462 U.S. 416 (1983).

⁹⁵ *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 (1983).

⁹⁶ Glennon, *supra* note 92, at 51.

extension, such actions also undermine the Supreme Court's image and legitimacy as a legal institution. With regard to abortion, Powell's plea apparently was ignored by four justices who indicated, either implicitly or explicitly, in *Webster v. Reproductive Health Services*⁹⁷ that they were prepared to overrule *Roe*. The addition of Justice David Souter could lead to *Roe*'s demise.

The emerging majority's inclination to overturn precedents is evident in many cases. For example, although both Chief Justice Rehnquist and Justice Kennedy have written opinions emphasizing the need to provide greater deference to previous decisions affecting statutory interpretation than to decisions interpreting the Constitution,⁹⁸ neither justice hesitated to join a slim majority that rewrote two important antidiscrimination statutes, without breathing a word about their previously stated respect for precedent.⁹⁹

⁹⁷ ____ U.S. ____, 109 S. Ct. 3040 (1989). In *Webster*, Chief Justice Rehnquist and Justices Kennedy and White thoroughly critiqued Blackmun's trimester analysis in *Roe* and thereby indicated that they wished to change a decision that they viewed as deeply flawed. Rehnquist and White were the only dissenters in *Roe*, so it is not surprising that they were eager to undo a decision with which they had always disagreed. Justice Scalia was forthright in his declaration that *Roe* should be reversed. *Id.* at 3064-67 (Scalia, J., concurring).

⁹⁸ Chief Justice Rehnquist stated that statutory interpretation precedents deserve greater respect than constitutional precedents: "*Stare decisis* is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes." *Webster v. Reproductive Health Services*, ____ U.S. ____, 109 S. Ct. 3040, 3056 (1989). In a racial discrimination case, Justice Kennedy wrote: "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson*, 491 U.S. 164, 109 S. Ct. at 2370.

⁹⁹ In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115 (1989), a five-member majority, including Rehnquist and Kennedy, increased the plaintiff's burden of proof in certain employment discrimination cases and thereby altered a well-established precedent in existence the previous eighteen years. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that barriers to employment resulting in racial discrimination are prohibited notwithstanding the employer's lack of discriminatory intent, unless shown to be related to job performance). Although downplaying the significance of the deviation from precedent, Justice White admitted in the majority opinion that "[w]e acknowledge that some of our earlier decisions can be read as suggesting [principles different than those we put forth today]." *Wards Cove Packing Co.*, 109 S. Ct. at 2126. In *Patterson*, a five-member majority limited the scope of a thirteen-year old civil rights precedent in order to preclude suits seeking damages for racial harassment. The new majority altered the precedent after taking the extraordinary step of asking, *sua sponte*, for reargument to consider reversing the precedent, Taylor, *supra* note 3, at 1, and after ignoring the request by forty-seven state attorneys general, including both Republicans and Democrats, to leave the precedent alone. Greenhouse, *Court Upholds Use of Rights Law But Limits How It Can Be Applied*, N.Y. Times, June 16, 1989, A1, A12, col. 1.

According to one observer, these actions illustrate the emerging majority's aggressive-

Rather than maintain the judicial conservative's usual rhetoric about ensuring stability in law and avoiding excessive activism by judges, members of the new majority explicitly state that they look forward to additional changes in the Supreme Court's composition so that they can reverse specific precedents with which they disagree. When Justice Blackmun's change of heart led to the reversal of a precedent affecting the applicability of federal labor laws to state government employees, Justice Rehnquist's dissent stated, "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."¹⁰⁰ There is nothing unusual about Rehnquist's desire to restore the prior precedent he favored. However, by eschewing reasoned argument and blatantly admitting that the political developments underlying the Supreme Court's composition determine the direction of constitutional law, he did not follow the usual course of protecting the Court's legitimacy by portraying it as an institution that follows legal principle. In 1989, Justice Scalia criticized the majority's decision favoring the rights of a criminal defendant and, in arguing for the reversal of a precedent, noted that "[o]verrulings of precedent rarely occur without a change in the Court's personnel."¹⁰¹ Furthermore, as he had done in abortion¹⁰² and affirmative action cases, Scalia forthrightly stated that he is concerned with advancing his own views of the Constitution regardless of contrary case precedents¹⁰³—a view that is understandable from one sworn to uphold the Constitution, but one that is distinctly different from that of a true judicial conservative.¹⁰⁴

ness in attacking civil rights precedents with which they disagree: "Conservative insistence on judicial diffidence when it comes to expanding constitutional rights is notorious and persistent.

[The conservative justices'] attitude shifts dramatically, however, when it comes to liberal legislation. There one finds an almost arrogant aggressiveness in narrowly reading laws for minorities, women, the handicapped, and the elderly." Schwartz, *Is the Rehnquist Court Activist? Yes: A Definite Agenda*, 76 A.B.A. J., Aug. 1, 1990, at 32.

¹⁰⁰ *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 580 (1985).

¹⁰¹ *South Carolina v. Gathers*, 490 U.S. 805, 109 S. Ct. 2207, 2217 (1989) (Scalia, J., dissenting).

¹⁰² See *Webster*, 109 S. Ct. at 3067 (Scalia, J., concurring) ("It thus appears that the mansion of constitutionalized abortion-law, constructed overnight in *Roe v. Wade*, must be disassembled door-jamb by door-jamb, and never entirely brought down, no matter how wrong it may be").

¹⁰³ *Gathers*, 109 S. Ct. at 2218 (Scalia, J., dissenting) ("In any case, I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face").

¹⁰⁴ Scalia acknowledges the possibility that there might be some undesirable precedents

B. Opportunities for Reversals by a Court Without Brennan

The possibility for quick reversal of established precedents looms large in the wake of Brennan's retirement. There are many areas of constitutional law in which the controlling precedents were established by slim majorities that relied upon Brennan's vote and influence as a coalition builder.¹⁰⁵

1. Abortion

The continued vitality of *Roe v. Wade*,¹⁰⁶ and a woman's right of choice regarding abortion, immediately became the focus of speculation when President Bush nominated Judge Souter to replace Justice Brennan.¹⁰⁷ Although President Bush attempted to minimize the controversy by asserting that he did not know Judge Souter's views on abortion,¹⁰⁸ Bush may be held responsible by the electorate for whatever his nominee does (or does not do) on the issue of abortion.¹⁰⁹ *Roe* and the constitutional right to obtain an abortion continue to survive by one vote. Although the Court reaffirmed *Roe* in numerous cases between 1973 and 1989,¹¹⁰ four

that "have become so embedded in our system of government that return is no longer possible," *Id.*, but he has not indicated which precedents those might be. In *Patterson*, despite Scalia's efforts during oral argument to encourage the attorney for the credit union to supply the justices with a persuasive argument that would permit reversal of the entire civil rights precedent, *Greenhouse, Justices Seem Unswayed By Civil Rights Debate They Sought*, N.Y. Times, Oct. 13, 1988, at A23, col. 1, the majority ultimately claimed that they upheld the precedent because it was well-established and workable. *Patterson*, 109 S. Ct. at 2370-72. Justice Brennan observed, however, that "[w]hat the Court declines to snatch away with one hand, it takes with other," *Patterson*, 109 S. Ct. at 2379 (Brennan, J., concurring in judgment in part and dissenting in part), because, in the words of one commentator, the five-member majority "pulled the teeth from [the civil rights] statute," Epstein, *supra* note 1, at A10, by eliminating suits for racial harassment. Thus, this purported adherence to an established precedent with which Scalia seemed to disagree actually involved a significant alteration in the precedent.

¹⁰⁵ See *supra* notes 48-50 and accompanying text. Justice Brennan is widely regarded as the "architect and strategist behind the [Supreme Court's] virtual remaking of the Constitution" during the Warren Court era. Kaplan, *A Master Builder*, Newsweek, July 30, 1990, at 19.

¹⁰⁶ 410 U.S. 113 (1973).

¹⁰⁷ See Morganthau, *supra* note 30, at 17.

¹⁰⁸ See Dowd, *Souter, New Hampshire Judge, Named by Bush for High Court; No 'Litmus Test,' President Says*, N.Y. Times, July 24, 1990, at A1, col. 3.

¹⁰⁹ Kramer, *Asking the Wrong Questions*, Time, Aug. 13, 1990, at 36.

¹¹⁰ See, e.g., *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (holding statute requiring physicians to inform patients of abortion risks and alternatives unconstitutional); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (holding parental consent, twenty-four hour waiting period, and

justices are poised for a quick reversal if they gain a like-minded new colleague. In *Webster v. Reproductive Health Services*, Scalia, Rehnquist, White, and Kennedy indicated that they are prepared to reverse the precedent as soon as they secure the needed fifth vote.¹¹¹

2. Affirmative Action

The remaining precedents supporting affirmative action hang by the proverbial thread. The emerging majority has already dispensed with some aspects of affirmative action, such as local government contract preferences for minority business enterprises, absent clear proof that the government itself engaged in discrimination.¹¹² Although minority preferences in federal media franchise licenses survived a challenge by a five-to-four margin in 1990,¹¹³ Brennan's departure opens the possibility that strident opponents of all affirmative action programs, such as Scalia, Rehnquist, and Kennedy, will be able to obtain the additional vote they need to invalidate the Federal Communications Commission program. Additionally, if Brennan's replacement is willing to overturn affirmative action precedents, there may be reversals of the other surviving case decisions involving federal contracting preferences,¹¹⁴ broad remedial judicial orders applying hiring quotas,¹¹⁵ voluntary employment plans including categorical preferences in the public¹¹⁶

requirement that second trimester abortion be performed in a hospital unconstitutional); *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52 (1976) (holding parental and spousal consent statute unconstitutional).

¹¹¹ Although abortion is a matter of enormous symbolic value to the opposing interest groups mobilized to take action regarding the issue, any reversal of *Roe* will have less practical impact than most people imagine. In *Webster*, five members of the Supreme Court already invited the states to regulate abortions and make abortions more difficult to obtain, even if they cannot yet abolish abortion. If a new appointee votes to reverse *Roe*, then abortions will remain available in many states because anti-abortion forces lack the political muscle to push most state legislatures to ban abortion. See McDaniel, *The Future of Abortion*, Newsweek, July 17, 1989, at 14 *et seq.*

¹¹² *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

¹¹³ *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, ____ U.S. ____, 110 S. Ct. 2997 (1990).

¹¹⁴ Only Justices Marshall, White, and Blackmun remain from the majority in *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

¹¹⁵ Justice Brennan was a member of the five-member majority in *United States v. Paradise*, 480 U.S. 149 (1987).

¹¹⁶ Justices Brennan and Powell were members of the six-member majority in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987).

and private sectors,¹¹⁷ and even preferential admissions in higher education.¹¹⁸

3. The "Exclusionary Rule" and Rights of Criminal Defendants

The emerging majority on the Supreme Court actively curtailed the rights of criminal defendants¹¹⁹ by placing limitations on traditional *Miranda*¹²⁰ rights,¹²¹ granting police more power to undertake warrantless searches,¹²² and easing the restrictions on capital punishment despite due process and equal protection problems.¹²³

¹¹⁷ Only Justices Stevens, Blackmun, Marshall, and White remain from the majority in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). Although Justice O'Connor supported the use of gender as a criterion in the hiring decision in *Johnson v. Transportation Agency*, it seems doubtful that she would support a broad voluntary affirmative action training program that contained a hiring quota for minorities, as in *United Steelworkers*, because her opinion in *City of Richmond v. J.A. Croson Co.* argues for narrowly tailored programs to remedy proven past discrimination.

¹¹⁸ Only Justices Black, White, and Marshall remain from the five-member majority that approved the use of race-conscious criteria in admissions decisions in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

¹¹⁹ See Smith, *Police Professionalism and the Rights of Criminal Defendants*, 26 CRIM. L. BULL. 155 (1990).

¹²⁰ The principles enunciated in *Miranda v. Arizona*, 384 U.S. 436 (1966), require law enforcement officers to inform arrestees of their rights prior to questioning.

¹²¹ In *Duckworth v. Eagan*, ____ U.S. ____, 109 S. Ct. 2875 (1989), police officers were allowed to deviate from normal *Miranda* warnings even when their presentation implied to the suspect that he might not be able to have his constitutional right to counsel fulfilled before questioning. In *Illinois v. Perkins*, ____ U.S. ____, 110 S. Ct. 2394 (1990), police officers disguised as prison inmates did not need to inform fellow prisoners of their rights before questioning them. See Greenhouse, *Justices Say the Police Can Use Deceit to Gain Confessions From Prisoners*, N.Y. Times, June 5, 1990, at A24, col. 1.

¹²² A closely-divided Court ruled that fourth amendment restrictions are inapplicable to United States law enforcement officers conducting searches in foreign countries. *United States v. Verdugo-Urquidez*, ____ U.S. ____, 110 S. Ct. 1056 (1990). A majority of the justices also ruled that police may search a residence without a warrant if they receive permission from someone who does not reside there, but whom the police "reasonably believe" lives there. *Illinois v. Rodriguez*, ____ U.S. ____, 110 S. Ct. 2793 (1990).

¹²³ Despite strong statistical evidence of racial discrimination in capital sentencing, a five-member majority declined to interfere with Georgia's capital punishment process. *McCleskey v. Kemp*, 481 U.S. 279 (1987). In *Murray v. Giarratano*, ____ U.S. ____, 109 S. Ct. 2765 (1989), despite evidence that a majority of death penalty convictions are found to be defective during appellate review in the federal courts, a slim majority of the justices refused to recognize a right to counsel for indigent prisoners on death row seeking collateral review of their convictions and sentences. By refusing to apply a later decision retroactively, a five-member majority upheld the death sentence of a prisoner while admitting that his rights had been violated during police questioning. *Butler v. McKellar*, ____ U.S. ____, 110 S. Ct. 1212 (1990). In *Butler*, although the Supreme Court does not discuss all of the factual circumstances, the defendant who faced execution, despite having his rights violated by police questioning outside of the presence of his attorney, was a severely retarded man who had the mental functioning of a nine-year-old. Marcus, *Waiting Forever on Death Row*, Wash. Post Nat'l W'kly, June 18-24, at 11.

In a 1990 test of the exclusionary rule's vitality, a narrow five-member majority declared that illegally obtained evidence could not be used to impeach a witness's testimony.¹²⁴ Justice Brennan was one of the five justices upholding the rule, and his departure may lead to further reductions in the constitutional protections for criminal defendants.¹²⁵

4. *The Judiciary's Remedial Powers*

The five members of the Court's emerging conservative majority have acted to limit the ability of federal judges to impose remedial orders in civil rights cases. In *Martin v Wilks*,¹²⁶ this slim majority permitted intervenors to halt the implementation of a consent decree designed to remedy a longstanding employment discrimination case. In *Spallone v United States*,¹²⁷ over Justice Brennan's objections that public officials will be encouraged to resist judicial orders,¹²⁸ the five-member majority determined that a district judge had to consider more options before levying fines against public officials who flouted judicial orders in a civil rights case. Although Brennan was a member of a narrow majority that approved a federal judge's authority to order a local tax increase in order to implement a school desegregation plan,¹²⁹ his departure may mean that he helped to establish only a short-lived precedent.

C. *Sudden Changes and the Supreme Court's Legitimacy*

Justice Brennan was reportedly "galled by the [C]ourt's reading of civil-rights statutes, its loosening of Fourth Amendment restraints on police power, and perhaps most of all its continuing

¹²⁴ *James v. Illinois*, ____ U.S. ____, 110 S. Ct. 648 (1990).

¹²⁵ Not all aspects of the exclusionary rule are threatened by Brennan's departure. The "plain view" doctrine, which limits a police officer's ability to extend warrantless searches beyond objects in plain view, has been supported by Justices Scalia, Blackmun, Marshall, White, and Stevens. See *Arizona v. Hicks*, 480 U.S. 321 (1987). In 1990, although maintaining the rule's existence, seven justices interpreted the rule more broadly than Justices Brennan and Marshall in order to permit the legal seizure of items that were not discovered "inadvertently." See *Horton v. California*, ____ U.S. ____, 110 S. Ct. 2301 (1990).

¹²⁶ 490 U.S. 754, 109 S. Ct. 2180 (1989).

¹²⁷ ____ U.S. ____, 110 S. Ct. 625 (1990).

¹²⁸ Brennan wrote in his dissent that, "[I] worry that the Court's message will have the unintended effect of emboldening recalcitrant officials continually to test the ultimate reach of the remedial authority of the federal courts." *Id.* at 648 (Brennan, J., dissenting).

¹²⁹ *Missouri v. Jenkins*, ____ U.S. ____, 110 S. Ct. 1651 (1990).

approval of capital punishment.”¹³⁰ His disappointment will undoubtedly grow if his former colleagues and his replacement actively seek to overturn case precedents. There are so many issues on which the Court is deeply divided that there will be many opportunities for the emerging majority to move constitutional law quickly in entirely new directions. Sudden changes in case decisions and concomitant public policies may adversely affect the Supreme Court’s image as a legal institution. Thus, Justice Souter will be called upon to assess the potential harm that may befall the Court as an institution as a result of facilitating wholesale changes in established precedents. Obviously, several current members of the Court share Justice Scalia’s view that “it [is] a violation of my oath to adhere to [established precedents] . . . in order that the Court might save face.”¹³¹ Such disregard for the role of *stare decisis* in protecting the Supreme Court’s image and legitimacy creates great uncertainty about what the Court’s dominant new majority will do in the immediate future.

IV LEGITIMACY AND THE SUPREME COURT’S COMPOSITION

The image and legitimacy of the Supreme Court may be affected by the fact that the Court will now be composed of seven Republicans and only two Democrats. Although scholars argue that having a diverse pool of judicial officers “can result in a strengthened judiciary whose presence can reassure certain segments of the population of the neutrality and fairness of the judicial process,”¹³² the composition of the Supreme Court is politically skewed in favor of a political party that can claim the affiliation of only one-third of the population.¹³³ The precise composition of the Supreme Court is determined by unplanned events that have significant impact upon the selection of new appointees.¹³⁴ Deaths,

¹³⁰ Kaplan, *supra* note 105, at 20.

¹³¹ *South Carolina v. Gathers*, 490 U.S. 805, 109 S. Ct. 2207, 2218 (1989) (Scalia, J., dissenting).

¹³² Goldman, *Judicial Selection and the Qualities that Make a “Good” Judge*, 462 ANNALS 112, 119 (1982).

¹³³ Surveys in 1986 indicated that only thirty-three percent of Americans identified themselves as Republicans. Forty percent of the public identified themselves as Democrats and twenty-seven percent identified themselves as Independents. E. LADD, *THE AMERICAN POLITY* 491 (2d ed. 1987).

¹³⁴ President Johnson’s political miscalculation in attempting to elevate his friend Abe Fortas to Chief Justice in the late 1960’s ultimately allowed President Nixon to make two additional appointments to replace justices whose slots should have been filled by Johnson

the aging process, and illness can lead to unplanned retirements by justices such as Brennan who presumably did not expect to retire while the opposing political party controlled the White House.

In a speech to a judges' conference, Justice Blackmun publicly raised concern about the effect of the 1988 presidential election on the Supreme Court's composition.¹³⁵ Although Blackmun made his observation out of concern for the future of constitutional law and the institution of the Court, he was criticized by commentators for erroneously "reject[ing] or [failing to] believe that the Court's status depends largely on the public perception that Justices stay above the political fray."¹³⁶ A grossly unbalanced Supreme Court, however, may threaten the institution's legitimacy either by losing public confidence in the Court's objectivity or by becoming out of step with the values and policies of mainstream society.

According to scholarly theories about the Supreme Court's role in the American political system, "the main contribution of the Court is to confer legality and constitutionality on the fundamental policies of the successful [political] coalition [that leads the institutions of government]."¹³⁷ In some areas of law, most notably civil rights, the aggressive attacks on case precedents by the emerging majority on the contemporary Supreme Court place the leading legal institution out of step with dominant societal values favoring the protection of rights of victimized minorities. This deviation from the mainstream is most evident in the passage by Congress, with comfortable margins of 65 to 34 in the Senate¹³⁸ and 272 to 154 in the House of Representatives,¹³⁹ of the Civil Rights Act of

appointees. See H. ABRAHAM, *supra* note 91, at 284-88. President Reagan's election to the White House in 1980 was facilitated by the Iranian hostage crisis and John Anderson's decision to run for the presidency as an independent. If not for those two events, Democrat Jimmy Carter might have remained as President during the early 1980's and thereby gained opportunities to appoint new justices. See Smith, *What If*. "Critical Junctures on the Road to (In)Equality, 15 T. MARSHALL L. REV. 1 (1989-90).

¹³⁵ According to Blackmun, "for better or for worse, depending on your point of view, the 1988 election will be a very significant one. The Court could become, if I use those old labels again, very conservative well into the twenty-first century if the election goes one way; if it goes the other way, who knows." Address by Justice Harry Blackmun, Eighth Circuit Judicial Conference (July 15, 1988).

¹³⁶ O'Brien & Collins, *The Wisdom of Judicial Lockjaw*, N.Y. Times, Sept. 29, 1988, at A27, col. 1.

¹³⁷ R. DAHL, *DEMOCRACY IN THE UNITED STATES* 161 (4th ed. 1981).

¹³⁸ Holmes, *No Compromise, Say Civil Rights Bill's Sponsors*, N.Y. Times, July 24, 1990, at A14, col. 1.

¹³⁹ Berke, *House Approves Civil Rights Bill; Veto Is Weighed*, N.Y. Times, Aug. 4, 1990, at 1, 11, col. 4.

1990. Congress designed the Civil Rights Act specifically to undo the emerging five-member conservative majority's 1989 decisions in *Martin v Wilks*,¹⁴⁰ *Wards Cove Packing Co. v Atonio*,¹⁴¹ and *Patterson v McLean Credit Union*,¹⁴² in which civil rights precedents were constricted.¹⁴³

Although the public may have relatively little awareness of the specific details of judicial processes and decisions,¹⁴⁴ public opinion research indicates that the public's perceptions of the Supreme Court are influenced by the justices' actions.¹⁴⁵ If the new Supreme Court majority continues to collide with Congress in its efforts to reverse established precedents in civil rights and other areas, there may be a cost to the Court's image and legitimacy. After studying public opinion data concerning the Supreme Court, one scholar concluded,

Expressed consistently, judicial opposition to Congress may in and of itself lead to resentment and loss of trust among the public—not because of any great love of the national legislature but, rather, as a result of the perception that the Court has upset the balance of our constitutional system.¹⁴⁶

Unabashed activism by the politically unrepresentative Supreme Court may thus tarnish the public's perception of the Court's position in the governing system.

CONCLUSION

Although the Supreme Court became more conservative in the 1970's with the addition of President Nixon's four appointees,¹⁴⁷ the Court did not retreat significantly from the precedents established by its Warren Court predecessors.¹⁴⁸ When President Reagan

¹⁴⁰ 490 U.S. 754, 109 S. Ct. 2180 (1989). See *supra* note 126 and accompanying text.

¹⁴¹ 490 U.S. 642, 109 S. Ct. 2115 (1989). See *supra* note 99.

¹⁴² 491 U.S. 164, 109 S. Ct. 2363 (1989). See *supra* note 98.

¹⁴³ See Moore, *House OKs Right Bill, But It Faces Bush's Veto*, Akron Beacon J., Aug. 4, 1990, at A1, A3, col.

¹⁴⁴ See Hyde, *supra* note 27, at 408.

¹⁴⁵ See Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139 (1987).

¹⁴⁶ Caldeira, *Neither The Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1222 (1986).

¹⁴⁷ See THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986 (H. Schwartz ed. 1987).

¹⁴⁸ See THE BURGER COURT: THE COUNTER REVOLUTION THAT WASN'T (V. Blasi ed. 1983).

made his concerted effort to fill the federal judiciary, including the Supreme Court, with ideological conservatives,¹⁴⁹ the Supreme Court entered a transitional era in which an emerging conservative majority initiated decisions abruptly shifting the development of law in several substantive areas.¹⁵⁰ As one observer commented, "Despite a Republican hold on the presidency for all but four years since 1968, the anticipated conservative coming, which has been either hoped-for or dreaded, depending on one's perspective, did not materialize until [1989]"¹⁵¹ with the participation of Justice Kennedy during an entire term.

The retirement of Justice Brennan will lead to further changes in the Supreme Court—changes that ultimately may affect the Court's image and legitimacy as the nation's leading legal institution. In the wake of Brennan's departure, if the justices' increasingly combative opinions and interactions continue to become more pronounced, the Court's decision making processes may begin to look more like a legislative body, affected by petty squabbles and indignant name calling. Moreover, if the emerging majority engages in wholesale reversals of established precedents, they will throw into question the qualities of stability and predictability that are purportedly hallmarks of the law. Because the Supreme Court is composed of conservative Republicans to a degree grossly disproportionate with the composition and views of the American public, these justices should pay special attention to the institutional consequences of their interactions and decisions lest the Supreme Court lose its legitimacy and effectiveness by suddenly becoming perceived as intimately associated with partisan values and policy preferences.

¹⁴⁹ See H. SCHWARTZ, *PACKING THE COURTS* (1988); E. WITT, *A DIFFERENT JUSTICE: REAGAN AND THE SUPREME COURT* (1986).

¹⁵⁰ One scholar has noted that the abrupt shifts led by the Supreme Court's emerging conservative majority will affect the work of legal scholars: "The advent of the Reagan-Rehnquist Court presents an opportunity for some corrective *perestroika*, as a broader set of constitutional scholars now suddenly experience the same frustrations that those concerned with criminal procedure have been facing for almost twenty years—the frustrations of living with a Court pursuing a pre-determined course toward Constitutional retrenchment." Kannar, *supra* note 16, at 1344.

¹⁵¹ Glennon, *supra* note 92, at 49.